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Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 349.

SPRINGFIELD SAND & TILE COMPANY ET AL.,
Petitioner,

v.

JAMES BAGNEL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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Statement of Matter Involved.

James Bagnel was injured on January 18, 1941. Some four years prior thereto he was hired in New York by Jacobson & Co., Inc., and had worked there. He was a resident of New York during his employment.

Jacobson & Co., Inc., was the general contractor in the manufacture of artificial stone actually being done by the petitioners as sub-contractors. Because of dissatisfaction with the character and progress of the work Jacobson & Co., Inc., on or about January 6, 1941, sent Bagnel to Massachusetts to temporarily participate in the job for his employer. He was injured while on the job in Massachusetts.

At the time of Bagnel's accident Jacobson & Co., Inc., was insured under the New York Workmen's Compensation Law, which was compulsory in respect to Bagnel's employment. By endorsement to its insurance policy coverage was also provided under the Massachusetts Workmen's Compensation Act, which was elective alike to employer and employee. Following his injury Bagnel accepted the benefits of the New York Act and thereafter brought actions against the petitioners alleging that their negligence caused his injuries.

Questions Presented.

I. Did Bagnel elect to be bound by the Massachusetts Workmen's Compensation Act?

II. Was Bagnel barred from bringing actions against the petitioners at common law, based upon their negligence, either by the New York Compensation Law or by the Massachusetts Workmen's Compensation Act?

Argument.

I. Did Bagnel elect to be bound by the Massachusetts Workmen's Compensation Act?

The Massachusetts Act, at the time of this accident, was elective with respect to both employers and employees. *Opinion of the Justices*, 209 Mass. 607, 96 N.E. 308. The employer was free to provide or to ignore workmen's compensation. The only way in which the employee's freedom to elect was preserved was by section 24 of the Act, General Laws (Ter. Ed.) chapter 152, as follows:

> "Notice by employee to retain rights at common law. An employee of an insured person shall be held

> to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein incurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. . . ."

Even were it assumed that Jacobson & Co., Inc., had already provided workmen's compensation under the Massachusetts Act, when Bagnel was hired in New York by a New York concern to work in New York there would have then been no occasion for him to make an election. However, this is not to be assumed by any fact in the record. Bagnel's election must be found within the terms of the second provision of section 24.

The employee is held to have elected under the second provision to come within the Massachusetts Act when he has failed to reserve his common-law rights "*within thirty days of notice of such insurance.*" The record fails to show that such notice was given.

In *Young* v. *Duncan*, 218 Mass. 346, 106 N.E. 1 (1914), the court distinguishes between an election by the employee under the first provision of section 24 and an election under its second provision. Knowledge or notice that the employer is insured is not essential to an election by the employee under the first provision. The court said (pp. 349-350):

> "This absolute and unequivocal provision is not made dependent upon any other condition or circumstance. It is not made to rest upon knowledge or

notice to him of the fact that the employer is a subscriber. That it was not intended to be dependent upon such knowledge or notice is plain from the concluding clause which, in the event of the employer becoming a subscriber after the employment, makes such waiver dependent upon notice. The expression of this condition in the one class of cases impliedly would exclude it from the other, even if the language used were less plain."

The decision in *Young* v. *Duncan* was reaffirmed in *Gilbert* v. *Wire Goods Co.*, 233 Mass. 570 (1919), 124 N.E. 479, arising under the second provision of section 24. It is to be observed that the notice required of the employer had been given in the latter decision. Bagnel was not required to make an election by giving notice of his reservation of common-law rights unless and until his employer had first given the notice required of an employer. It follows that he had not elected to be bound by the whole or any part of the Massachusetts Compensation Act.

By virtue of Massachusetts Acts and Resolves of 1943, chapter 529, section 6, the provisions of section 24 as effective upon Bagnel's rights have ceased to be of future significance. The fact of the subsequent amendment, which no longer requires notice by the employer, implies a change in the earlier law and knowledge of its judicial construction. Sutherland, Statutory Construction (3d ed., 1943), section 1930.

Because of the foregoing authorities the decision of the Circuit Court of Appeals may be upheld upon the ground that the petitioners failed to sustain the burden of proving their defense. This may be done by reference solely to the Massachusetts Act and the Massachusetts decisions interpreting the Act.

II. Was Bagnel barred from bringing actions against the petitioners at common law, based upon their negligence, either by the New York Compensation Law or by the Massachusetts Workmen's Compensation Act?

A. Under the New York Compensation Law.

Bagnel, in these actions, is neither seeking compensation provided *by his employer* under the Massachusetts Workmen's Compensation Act, nor is he suing *his own employer* in tort under the common law. It does not even appear from the record that he received an award under the New York Compensation Law. The Transcript of Record, at page 21, the last clause in the paragraph numbered 7, states no more than that "Bagnel accepted the benefits of the Workmen's Compensation Law of the State of New York." The decision of *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), stressed in the petitioners' brief, is not in point, being distinguishable by the foregoing.

The New York Workmen's Compensation Law is compulsory as to employer and employee alike when they are engaged in certain specified "hazardous employments." That Bagnel was engaged in such an employment is shown by Consolidated Laws of New York, chapter 167, section 3, "Application," as follows:

> "1. Hazardous Employments. Compensation shall be payable for injuries or death incurred by employees in the following employments: . . . Group 6. Manufacture of: Stone, artificial."

The employer is required to provide compensation.

> "*Section 10.* Liability for compensation. Every employer subject to this chapter shall in accordance

with this chapter . . . , secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of or in the course of the employment without regard to fault as a cause of the injury . . ."

The liability of the employer, when compensation is provided, is exclusively under the Compensation Law. The employee has no election whether to come under the Law or to pursue common-law rights against his employer, the election permitted by the Massachusetts Act.

> "*Section 11.* Alternative Remedy. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee . . .
>
> "*Section 32.* Waiver agreements void. No agreement by an employee to waive his right to compensation under this chapter shall be valid."

Also, unlike section 15 of the Massachusetts Act, which provides:

> "Where the injury *for which compensation is payable* was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but, except as hereinafter provided, not against both. . . ."—

the New York Law, in section 29, provides:

> "Remedies of employees, subrogation 1. If an employee entitled to compensation under this chapter be

injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and at anytime either prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, . . . , take or intend to take compensation under the chapter and desire to bring action against such other, such action must be commenced not later than six months after awarding of compensation and in any event before the expiration of one year from the date such action accrues." (Added by laws of 1937, chapter 684.)

Comparison of the two sections shows the New York Law expressly provides the employee shall not be barred from pursuing third-party rights, or held to have made an election, by accepting compensation. The Massachusetts Act limits the effect of section 15 to injuries "for which compensation is payable," meaning compensation under the Massachusetts Act. See *Clark* v. *M. W. Leahy Co., Inc.*, 300 Mass. 565, at pages 569 and 570, 16 N.E. (2d) 57 (1938).

The New York Law gives extraterritorial effect to its provisions when the work done outside the state was transitory and incidental to a New York employment. *Smith* v. *Aerovane Utilities Corp.*, 259 N.Y. 126, 181 N.E. 72 (1932). See also section 13 (*b*).

B. Under the Massachusetts Workmen's Compensation Act.

Early in the history of workmen's compensation legislation it was settled by the decision in *Gould's Case*, 215 Mass. 480, 102 N.E. 693 (1915), that the Massachusetts Act had no extraterritorial effect. One objection raised at page 485 was that "If our act is to be interpreted as having extraterritorial force, similar effect must be accorded to like laws of other States." This localized view continued until section 26 of the Act was amended by Acts of 1927, chapter 309, section 3, to read as follows:

> "SECTION 26. Payments. Presumption of employment. Extraterritoriality. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, . . . *and whether within or without the commonwealth, he shall be paid compensation by the insurer,* as hereinafter provided, if his employer is an insured person at the time of the injury; *provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it . . .*" (The italicized words were added by Acts of 1927, chapter 309, section 5.)

Following the 1927 amendment to section 26 of the Act it was held that injuries received by an employee when outside the state "arising out of and in the course of his employment" in Massachusetts should be compensated. *Pederzoli's Case*, 269 Mass. 550, 169 N.E. 427 (1930). The opinion, on page 553, cites the New York decision of *Post*

v. *Burger & Gohlke,* 216 N.Y. 544, 111 N.E. 351 (1916), which is relied upon in the more recent decision of *Smith* v. *Aerovane Utilities Corp.,* 259 N.Y. 126, 181 N.E. 72 (1932), interpreting the extraterritorial provisions of the New York Compensation Law.

The Pederzoli decision was followed by *McLaughlin's Case,* 274 Mass. 217, 174 N.E. 338 (1931). On page 219 the court stated as follows:

> "It is settled law that an employee who makes a contract of employment in this State with a Massachusetts employer to do work outside the Commonwealth, and while so occupied is injured, can recover under the workmen's compensation act."

On page 221 the court added:

> "The compensation act of the place of hiring, therefore, is applicable. This construction of the statute does not render it in conflict with the full faith and credit clause of the Federal Constitution" (citing *Quong Ham Wah Co.* v. *Industrial Acc. Com. of California,* 184 Cal. 26, 36).

This interpretation of the 1927 amendment, that the place of hiring governs which of two or more compensation acts is applicable, has been consistently followed in Massachusetts and may be considered its declaration of public policy in point. Thus its public policy is in harmony with the New York law. *Migues's Case,* 281 Mass. 373, 183 N.E. 847 (1933). *Wright's Case,* 291 Mass. 334, 197 N.E. 5 (1935). *Bauer's Case,* 314 Mass. 4, 49 N.E. (2d) 118 (1943).

No Massachusetts decision has ever refused to recognize the extraterritorial effect of the law of the state where the contract of employment was made. The decisions of

Pacific Employers Insurance Co. v. *Industrial Accident Commission*, 306 U.S. 493 (1939), and *Alaska Packers Assn.* v. *Industrial Accident Commission*, 294 U.S. 532 (1935), have decided that "Due Faith and Credit" do not require one state to give way to the compensation act of another state in violation of its own established public policy or interests. However, when no violation of this character is demonstrated the forum state will give "Due Faith and Credit" to the foreign law. *Bradford Electric Light Co.* v. *Clapper, Admx.*, 286 U.S. 145 (1932).

The common-employment theory, urged as a defense by the petitioners, is summarized in the case of *Clark* v. *M. W. Leahy Co., Inc.*, 300 Mass. 565, 16 N.E. (2d) 57 (1938), which the decision in *Carlson* v. *Dowgielewicz*, 304 Mass. 560, 24 N.E. (2d) 538 (1939), quotes and follows. However, this theory does not apply when the injured employee has no right to compensation under the Massachusetts Act. The limitation is clearly stated on pages 569 and 570 of the decision:

> "The waiver of rights of action at common law under G. L. (Ter. Ed.) c. 152, § 24, assumes an injury which is compensable under the workmen's compensation act. The Legislature intended indeed to make it difficult for either employer or employee to escape from the system of personal injury insurance provided by the act. *Young* v. *Duncan*, 218 Mass. 346, 349. *McDonnell* v. *Berkshire Street Railway*, 243 Mass. 94. But the Legislature did not intend to deprive an employee of a right of action at common law without giving him a right to compensation under the act. In *Zygmuntowicz* v. *American Steel & Wire Co. of New Jersey*, 240 Mass. 421, 424, the immunity of an insured employer to an action by one employee for an assault by another, was put on the ground that the

resulting injury was compensable. See also *White* v. *E. T. Slattery Co.* 236 Mass. 28, 31; *Cameron* v. *State Theatre Co.* 256 Mass. 466; *Caira* v. *Caira*, 296 Mass. 448. On the other hand, where a personal injury to an employee who has reserved no common law rights is not of a compensable class, he may recover at common law from his employer provided he can show a breach of duty. *Ross* v. *John Hancock Mutual Life Ins. Co.* 222 Mass. 560. *White* v. *Checker Taxi Co.* 284 Mass. 73, 75. When the immunity from common law action for personal injury becomes extended to those who are working in various capacities under a 'common employer' who is 'an insured person,' that immunity is granted, as in the simple case of a single employer and his employee, only where the personal injury is a compensable one. *Cozzo* v. *Atlantic Refining Co.* 299 Mass. 260, 262-263. In the present case the facts found show that the plaintiff's injury was compensable. Indeed, compensation was actually paid for it."

Since Bagnel has no right to compensation under the Massachusetts Act, the common-employment theory is not a bar to his third-party rights.

Conclusion.

None of the reasons ordinarily deemed sufficient to move this court to grant certiorari is presented in this case. Supreme Court Rules, Rule 38, paragraph 5. The decision of the Circuit Court of Appeals was clearly right. We urge that the petition be denied.

Respectfully submitted,

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